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No. 80-2066

IN THE

Supreme Court of the United States

October Term, 1980

UNIVERSITY OF PITTSBURGH,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. STATEMENT

This reply brief is submitted in response to the brief of the respondent Equal Employment Opportunity Commission ("EEOC") in opposition to the University of Pittsburgh's (the "University") Petition for a Writ of Certiorari. Respondent's Brief in Opposition limits itself to an argument that the decision below was correct. As such, respondent's Brief in Opposition either ignores or concedes the reasons presented by the University and by Amicus Curiae which militate in favor of the granting of certiorari. To reiterate those reasons, certiorari should issue because the decision below conflicts in principle with decisions of other courts of appeal concerning whether salaries paid in one profession are relevant to salaries paid in totally separate and distinct professions; the decision below is inconsistent with prior rulings of this Court concerning the burden of proof of relevancy in a subpoena enforcement action and, most importantly, after *Gunther*,[1] the nation's colleges and universities, as well as other employers, must have guidance concerning whether the mere payment of different salaries to different groups of people in different and unrelated professions, absent any intentional discrimination, violates Title VII of the Equal Employment Opportunity Act.

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1. *County of Washington v. Gunther,* 101 S.Ct. 2242 (1981).

II. ARGUMENT

1. Respondent's Brief In Opposition Argues That The Level Of Salaries Paid To Faculty Members In Schools Separate, Distinct And Independent From The School Of Nursing Are Relevant To Determine The Existence Of Salary Discrimination Against Faculty Members In The School Of Nursing. The Cases Relied Upon By Respondent Are Inapposite.

The cases cited by the respondent (*Respondent's Brief in Opposition,* at 6-7) suggesting that the EEOC has investigatory powers which go beyond that of the factual allegations of the complaining party, either involve employment settings where generally one central person or department makes all employment decisions, or where a facility-wide employment policy is at issue.[2]

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2. In *Motorola, Inc. v. McLain,* 484 F.2d 1339 (7th Cir. 1973), *cert. denied,* 416 U.S. 936 (1974) the information requested related to two plants where, among other things, segregated seniority lines were at issue. In *EEOC v. University of New Mexico,* 504 F.2d 1296 (10th Cir. 1974), the inquiry was limited to a single school out of many at one university.

New Orleans Public Service, Inc. v. Brown, 507 F.2d 160 (5th Cir. 1975) is simply not on point. That case dealt with whether or not the EEOC could investigate a particular charge. *General Telephone Co. v. EEOC,* 446 U.S. 318 (1980) similarly is inapplicable; it held that the EEOC need not seek class certification as a representative of a class before seeking classwide relief. The other cases cited by the respondent are representative of one line of cases which has construed the EEOC's investigative powers broadly. However, a second line of cases also exists which has limited the EEOC's investigatory powers. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 779-802 (1976 & Supp. 1979).

Although generally unarticulated, such centralization of personnel functions is a crucial assumption to the decisions cited by the respondent, for without such control the salary decisions in one department could not possibly be relevant to establish a "pattern or practice" of discrimination in separate and unrelated departments.[3]

In addition, the legal arguments suggesting centralized control of salary decisions set forth by the EEOC should not be recognized by this Court. The EEOC offered absolutely no testimony at the hearing supportive of this legal theory. Had the EEOC attempted to establish this theory of relevance at the hearing, the Uni-

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3. The respondent erroneously contends that the testimony of David Epperson, Dean of the School of Social Work, established centralized salary administration. (*Respondent's Brief in Opposition,* at 6, n.7.)

A close examination of the total testimony of Dr. Epperson, the Dean of the School of Social Work, (R.103a-131a) shows that he did not testify that faculty salaries are centrally controlled within the University. Rather, his testimony and that of the other deans demonstrates that each school is unique, that salary information is not disclosed to other schools of the University, and that various factors influence recommendations for salaries. Each Dean weighted these factors for their school very differently. This is well illustrated by Exhibit A (R.160a) admitted into evidence by the District Court. In addition, as noted in the Brief of Amicus Curiae (at 8-9), the vagaries of the marketplace have a significant impact on faculty salaries. Factors such as demand for teachers in certain disciplines, the needs of business for graduates with particular skills and funding for research directly impact on faculty salaries. The suggestion that such salaries are comparable is not supported by the record or the literature on the subject. *See* Treatises and Articles cited in the Brief of Amicus Curiae at 8-9, 14.

versity would have had the opportunity to present evidence concerning the setting of salaries and how salaries in separate professional schools are separately determined. Because the respondent did not allege centralized salary administration at the trial court level, the record was not totally developed by the parties.[4] At a minimum, this Court should remand this case to the District Court so that a full record can be developed on the issue of centralized control.[5]

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4. The failure of the EEOC to raise the theory of relevance based on centralized control is another reason for reversal of this case. Admittedly the Government need not prove discrimination before it can issue the subpoena, but *United States v. Powell,* 379 U.S. 48 (1964), places the burden on the Government to establish that the material sought is relevant. The District Court incorrectly placed this burden on petitioner. The failure of the Government to prove the potentially relevant theory of centralized salary administration as justifying the subpoena runs afoul of the mandate of *Powell.*

5. The EEOC also claims that because the charge filed "alleges University-wide sex-based wage discrimination" the information sought is relevant. (*Respondent's Brief in Opposition,* at 5.), Respondent ignores the Third Circuit's finding that the charge was filed by Margaret Carroll "on behalf of twenty-nine present or former faculty members in the School of Nursing . . ." (App. A at 3a, n.1). The EEOC has not challenged this holding by the Third Circuit.

2. The EEOC Contends That This Court's Recent Decision In County Of Washington v. Gunther, 101 S.Ct. 2242 (1981) Makes Salaries Paid In One Profession Relevant To Salaries Paid In Totally Different Professions. This Contention Is Erroneous.

In *Gunther,* this Court in a 5 to 4 decision, held that jail matrons alleging intentional sex discrimination could attempt to prove their claims by introducing evidence of salaries paid to male guards in the same jail. This Court found that the Bennett Amendment to Title VII, 42 U.S.C. §2000e-2(h) does not restrict Title VII's prohibitions against sex discrimination to those actions which also violate the Equal Pay Act, 29 U.S.C. §206(d). This Court, however, was careful to point out that its decision did not approve the theory of "comparable worth." 101 S.Ct. at 2246.

Paul Southworth, the EEOC Compliance Officer, testified that the *sole* purpose of his investigation was to compare professors across school lines. (R.75a) The charging party in this case merely alleged the payment of different salaries and did not allege any intentional discrimination such as the surveys involved in *Gunther* or the key sheets and job evaluation manual involved in *International Union of Electrical Workers v. Westinghouse Electric Corp.,* 631 F.2d 1094 (3d Cir. 1980), *cert. denied,* —— U.S. —— (1981). Nevertheless, the respondent contends, (*Respondent's Brief in Opposition,* at 6, n.7) that *Gunther* holds that this information is relevant. This interpretation by the agency which enforces Title VII provides one of the strongest reasons why certiorari should be granted, for its places a tremendous power in the EEOC to interrupt the day to day activities of the academic world when the agency in its

discretion believes that certain unrelated positions should be compared. As a result the respondent apparently has adopted the theory of comparable worth, thus far resisted by this Court.

3. The Uncertainty Of The Applicability Of Gunther To Cases In Which There Is No Evidence Of Intentional Discrimination Is An Additional Reason That This Court Should Grant The Petition For A Writ Of Certiorari.

The holding in *Gunther, supra,* was limited to cases of intentional discrimination. 101 S.Ct. at 2246. In this case, the discrimination charged is based solely on a comparison of dissimilar jobs. Without an allegation of intentional discrimination, a reviewing agency as well as the courts have no choice but to engage in a subjective evaluation of the "comparable worth" of "comparable" positions.[6]

Lower courts have held that salary discrimination cannot be found where all that the court has before it is a comparison of salaries. *E.g. Lemons v. City and County of Denver,* 620 F.2d 228 (10th Cir.), *cert. denied,* 101 S.Ct. 244 (1980) (nurses may not be compared to non-nursing positions); *Christensen v. State of Iowa,* 563 F.2d 353 (8th Cir. 1977) (comparison of the salary of female clerks with male workers in physical plant department of state university is improper.)

This Court has before it no more than a variety of dissimilar jobs, with no objective basis for comparison of those jobs and no allegation of intentional discrimination. If *Gunther* permits the "comparable worth" evalua-

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6. As indicated by the record, the professional positions at issue here, unlike the prison guard jobs in *Gunther,* are not even "comparable."

tion sought by the EEOC in this case, this Court should specifically so hold. The Petition for a Writ of Certiorari should be granted so that this significant issue may be resolved.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, the University of Pittsburgh respectfully prays that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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